IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA	)	
	)	
v.	)	Crim. No. 01-455-A
	)	Judge Leonie M. Brinkema
ZACARIAS MOUSSAOUI	)	

DEFENDANT'S OPPOSITION TO GOVERNMENT'S MOTION FOR RECONSIDERATION OF ORDER REGARDING MENTAL HEALTH EVIDENCE

The Government has moved the Court to reconsider that portion of its July 23, 2004 Order (dkt. no. 1185) declining to "limit any contact between mental health professionals and the defendant." Order at 2, n.1. Citing *United States v. Beckford*, 962 F. Supp. 748, 765-66 (E.D. Va. 1997), the Government asserts that it "may suffer significantly if the defendant's mental health expert has access to the defendant before the Court enforces Rule 12.2" because of the phenomenon of "practice effect." Motion at 1. The Government also asserts that at the June 10, 2004 deposition, Mr. Zerkin "agreed that the defense mental health experts would not have any contact with the defendant until the Court addresses the Government's mental health motion." *Id*. at 2. The Government requests that the Court bar any "mental health expert from either side" from having "access to the defendant" until its stayed motion is resolved. *Id*.

Defense counsel's memory of the exchange on June 10 is slightly different, although they are not certain as to its details.[1] Counsel's memory is that the Government raised the question of access and the Court inquired of Mr. Zerkin whether the parties could discuss or resolve the issue among themselves, to which he answered affirmatively. Counsel

[1] A transcript of the June 10 proceeding is not yet available.

believe that, if Mr. Zerkin committed to anything else, it was that no *testing* would be performed in the interim.

Without belaboring the issue and, therefore, defeating the very purpose of the Court's stay, the Defendant would note that the Government has overreached in requesting that the Court bar any "mental health expert from either side" from having "access to the defendant." As the Government's motion indicates, the phenomenon of "practice effect" relates to psychological "testing." Motion at 1. Indeed, the portion of the decision in *Beckford* which addressed "practice effect" specifically related to *neuropsychological testing*. 962 F. Supp. at 765-66 (discussing the Government's concern that "certain well-established *memory* and *intelligence* tests can only be performed once in any six month to one year period with any degree of accuracy") (emphasis added). Nothing in *Beckford*, nor in the Government's motion, provides any basis for restricting clinical interviews or other observations of the Defendant by a defense mental health expert. In short, the timing of the defense's preparation of a mental health case is none of the Government's business at least so long as neuropsychological testing is not being performed.[2]

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[2] Moreover, any "practice effect" does not last forever, and there are tests that can "minimize the negative impact on subsequent evaluation." *See Beckford*, 962 F. Supp. at 766 (citing affidavit of Dr. Hart). Even the Government's expert in *Beckford* testified to a practice effect on certain tests which lasts six months to one year. *See id.* at 765. Although not discussed in *Beckford*, for every such test there are alternative tests. Given that the Court has said that any capital trial in this case will not take place for at least six months after return of the mandate from the Court of Appeals, the Government's concern is exaggerated even as to actual testing. However, the defense has no intention of having neuropsychological testing performed and, if it ever does, will not do so until the Court rules on the Government's motion.

Finally, even if the Government's recollection of the exchange in court is correct, it does not justify an indefinite prohibition on the defense's ability to have the Defendant seen by its own mental health experts, even assuming Mr. Moussaoui consents to be seen. At the time of the deposition, there was no motion pending which sought the all-encompassing ban on defense access which the Government raised in its subsequent pleading. The only pending motion, the Government's Motion and Incorporated Memorandum Regarding Mental Health Evidence filed on April 8, 2002 (dkt. no. 93), did not seek the restrictions the Government now seeks. Given the unprecedented nature of the Government's requested relief, and the uncertainty as to when these matters might be finally addressed, the willingness of defense counsel to facilitate an end to the hearing on June 10 should not be interpreted as the broad concession which the Government makes it out to be.

For the foregoing reasons, the Government’s motion to reconsider should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE[3]

I HEREBY CERTIFY that on this 30th day of July 2004, a true copy of the foregoing pleading was served upon AUSA Robert A. Spencer, AUSA David J. Novak and AUSA David Raskin, U.S. Attorney's Office, 2100 Jamieson Avenue, Alexandria, VA 22314, by placing a copy BY HAND in the box designated for the United States Attorney's Office in the Clerk's Office of the U.S. District Court for the Eastern District of Virginia and by FACSIMILE upon same to 703-299-3982 (AUSA Spencer), 804-771-2316 (AUSA Novak) and 212-637-0004 (AUSA Raskin).

/S/
Kenneth P. Troccoli

[3] Pursuant to the Court's order of October 3, 2002 (dkt. no. 594), the instant pleading was presented to the CSO for a classification review before filing. That review determined that the pleading is not classified. A copy of this pleading was not provided to Mr. Moussaoui until after completion of the classification review.